criticism of inartistic drafting; for in view of the pre-eminence of the United States Constitution in the carefulness and conciseness of its language, it is a little to ask that amendments be made to conform to the original text.

APPLICATION OF THE RULE IN SHELLEY'S CASE TO GIFTS OF PERSONAL PROPERTY. — "When the ancestor by any gift or conveyance taketh an estate in freehold and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, 'the heirs' are words of limitation of the estate and not words of purchase." [1] This doctrine, known as the Rule in Shelley's Case, has with some qualifications long governed the limitation in deeds and wills of equitable as well as legal estates; [2] and after much controversy it is now settled to be not a mere rule of construction, but a rule of law overriding the intent of the settlor.[3] Although subjected to much adverse judicial comment, and modified or abolished by statute in the majority of our states, the rule as to realty still holds in England and several jurisdictions of this country.[4]

The direct application of the Rule in Shelley's Case to gifts of personal property would be impossible. Aside from any argument based on the much controverted origin of the rule,[5] and the difference in the rules governing future interests in realty and personalty,[6] the very terms "heirs" and "heirs of the body" are inapplicable to personalty.[7] But on its indirect application to personalty[8] the authorities are in great confusion. Much apparent conflict, however, may be explained away. In the first place many decisions cited as authorities for and against the applicability of the rule to personalty are based upon facts which do not include, as they should in order to raise the question, all the requirements which would be necessary for the operation of the rule in realty.[9] Again, many seemingly irreconcilable cases turn upon the construction of wills, and so may be reduced to mere differences in interpretation by the judges of the language employed.[10] And finally much conflict between the early and later decisions is due to the tendency of modern courts to carry out the evident intent of the testator at the expense of technical rules of law.

Though the countless variations in the language used prevent a full classification, the cases most frequently cited for the application of the Rule in Shelley's Case to personalty may be grouped into three divisions. (1) Where the gift is to A for life and after his decease "to his executors,

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[1] 1 Rep. 93 b.

[2] Van Grutten *v.* Foxwell, [1897] A. C. 658; *In re* Youman's Will, [1901] 1 Ch. 720; 2 Washburn, Real Prop., 6 ed., § 1601, § 1610.

[3] Perrin *v.* Blake, 1 W. Bl. 671; Carpenter *v.* Van Olinder, 127 Ill. 42. See 11 HARV. L. REV. 418.

[4] Van Grutten *v.* Foxwell, *supra;* Jones *v.* Rees, 69 Atl. 785 (Del.). See Washburn, Real Prop., 6 ed., p. 567 note, for list of U. S. statutes.

[5] Van Grutten *v.* Foxwell, [1897] A. C. 658, 667.

[6] Gray, Rule Perp., 2 ed., §§ 71–98; Williams, Pers. Prop., 16 ed., 356.

[7] Williams, Pers. Prop., 16 ed., 363.

[8] The cases seem to draw no distinction between chattels real and chattels personal.

[9] Thus words similar to those used in the following cases as to personalty would not have fallen within the rule if used as to realty. Bennett *v.* Bennett, 217 Ill. 434; Vogt *v.* Vogt, 26 App. D. C. 46; Hughes *v.* Cannon, 21 Tenn. 589.

[10] *See* Jones *v.* Rees, *supra,* quoting 4 Kent, Comm., 12 ed., 534.

administrators and assigns," A has been held entitled to an absolute interest.[11] As this result is only giving effect to the expressed intent of the testator, to explain it as an example of the operation of the Rule in Shelley's Case, a rule not of construction but of law, seems absurd.[12] (2) Bequests to A for life, remainder "to the heirs of his body" have quite uniformly been held to pass an absolute interest to A.[13] Here the Rule in Shelley's Case is involved, but only incidentally as a preliminary step in the operation of a broader rule, a rule of construction to the effect that where in a bequest of personalty words are used which would pass an estate tail in realty, the legatee takes an absolute interest.[14] Since in realty the Rule in Shelley's Case would, as a matter of law, entitle A in a bequest like that above to an estate tail, by this rule of construction he receives an absolute interest in personalty. But it has been suggested that this rule of construction should more properly be framed so as to pass an absolute interest in personalty only when such words are employed as would, in a devise of realty, *show an intent* to give an estate tail.[15] And such is the tendency of the modern decisions.[16] In accordance with this suggestion, whatever may be the form of language used in subsequent limitations, an intent on the part of the testator to restrict the first taker to a life estate in personalty should be effectuated, even though the arbitrary Rule of Shelley's Case would give an estate tail by the same limitations in realty. This view finds support at least where the language used varies from the technical form "heirs of the body," as when the gift is to A for life and then "to his issue."[17] (3) There are several cases where a bequest to A for his life and after his decease "to his heirs" has been held to vest an absolute interest in A.[18] As these words would by the Rule in Shelley's Case give a fee simple in realty there is no chance for the application of the rule of construction employed in the previous class of cases; hence the courts have been tempted to go the full length and apply the Rule of Shelley's Case "by way of analogy."[19] But as the rule thus applied has been held to yield to a contrary intent on the part of the testator, it is plainly used as a mere rule of construction.[20] And to borrow in this way an arbitrary rule of law the object of which, it may be said, is to defeat intention, for use as a test in the determination of such intent is fantastic. Accordingly, the more recent English authorities and several jurisdictions in this country are opposed to such an application of the rule.[21] Nor should the

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[11] Avern *v.* Lloyd, L. R. 5 Eq. 383; Hames *v.* Hames, 2 Keen 646. *Cf.* Alger *v.* Parrott, L. R. 3 Eq. 328.

[12] Kales, Future Interests, § 135 and cases cited.

[13] Elton *v.* Eason, 19 Ves. Jr. 73; Butterfield *v.* Butterfield, 1 Ves. 133; Williams *v.* Lewis, 6 H. L. Cas. 1013 (Leasehold).

[14] Polk *v.* Faris, 9 Yerg. (Tenn.) 209; Machen *v.* Machen, 15 Ala. 373. See also authorities cited in note 13, *supra.*

[15] Gray, Rule Perp., 2 ed., § 647 n. 3; *In re* Jeaffreson's Trusts, L. R. 2 Eq. 276, 280.

[16] *In re* Bishop & Richardson's Contract, [1899] 1 I. R. 71; Tingley *v.* Harris, 20 R. I. 517.

[17] *Ex parte* Wynch, 5 DeG. M. & G. 188; Foster *v.* Wybrants, Ir. R. 11 Eq. 40 (Leasehold); Heiss' Estate, 1 Pa. C. C. 397. *Cf.* Cleveland *v.* Havens, 13 N. J. Eq. 101.

[18] Appeal of Cockins, 111 Pa. St. 26; Horne *v.* Lyeth, 4 Har. & J. (Md.) 431 (Leasehold).

[19] Taylor *v.* Lindsay, 14 R. I. 518; Glover *v.* Condell, 163 Ill. 566.

[20] Bucklin *v.* Creighton, 18 R. I. 325. But *cf.* Hughes *v.* Nicklas, 70 Md. 484.

[21] Smith *v.* Butcher, 10 Ch. D. 113. (Comfort *v.* Brown, 10 Ch. D. 146, *contra*, was

circumstance sometimes relied upon, that realty and personalty are disposed of in the same clause, make a difference; for it has long been held that the same words when used in connection with different subjects may bear different constructions.[22]

The problem under discussion was presented in a recent case where realty and personalty were left upon trust to pay the income in equal shares "to A and B during their lives, and upon the death of either, her share to go to her heirs" until one half the principal had been paid to them. In accordance with both reason and authority it was held that the Rule in Shelley's Case applied to the gift of realty but not to the gift of personalty. *Lord* v. *Comstock*, 88 N. E. 1012 (Ill.).

TIME AS OF WHICH THE VALUE OF DOWER IS COMPUTED. — On the death of her husband a wife's right is to an assignment for life of lands one third in value of all those of which at any time during coverture the husband was seised; as of what time value is to be computed is a point upon which authorities have disagreed for centuries. From the earliest times it has been reasonably clear that where property of which a woman is dowable fluctuates in value after the death of the husband and before the assignment by the heir, her interest shall be set off on the basis of the changed value.[1] Plowden,[2] indeed, while admitting that ameliorations in the quality of the soil would inure to her, queried the right of a wife to profit by "collateral improvements"; but the distinction was not adopted. Early authority[3] was, however, cited by classic text writers[4] for the proposition that as to land aliened by the husband permanent improvements subsequently made were not to enhance the share of the wife. But in the case[5] which founded the modern English law of the subject a wife was, as to property which had been improved after alienation by the husband and before his decease, declared dowable at the higher rate. And a recent decision establishes in England the widow's right to share in all advances from natural or artificial causes in the hands alike of alienee or heir up to the moment when her interest is set off. *Williams* v. *Thomas*, [1909] 1 Ch. 713 (Eng., Ct. App., Mch., 1909).

Before its repudiation in England, however, this distinction between alienees of the husband and his heirs or devisees, was recognized in this country;[6] and it continues to be law to-day. In all the states a wife may share in appreciation from natural causes while the property remains unassigned in the hands of heir or devisee;[7] and the rule is almost every-

disregarded in *In re* Bishop & Richardson's Contract, *supra*); Jones *v.* Rees, 69 Atl. 785 (Del.).

[22] Forth *v.* Chapman, 1 P. Wms. 663; Herrick *v.* Franklin, L. R. 6 Eq. 593; Heiss Estate, 1 Pa. C. C. 397. But a different rule might be followed where the personalty is an adjunct to the realty. See Jackson *v.* Calvert, 1 J. & H. 235, 238.

[1] Fitzh. Abr. Tit. Voucher, 298.
[2] Plowd. Qu. 46.
[3] M. 17 H. 3 cited in Fitzh. Abr. Tit. Dower, 192.
[4] Co. Litt. 32 a; Perk. Conveyancing, § 328.
[5] Doe d. Riddell *v.* Gwinnell, [1841] 1 Q. B. 682.
[6] Powell *v.* Monson, etc., Man'f. Co., 3 Mason, 347.
[7] Catlin *v.* Ware, 9 Mass. 218.